(2)

No. 90-1206

Supreme Court, U.S.
FILED
FEB 19 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

ELDA VILLARREAL,

Petitioner,

vs.

HARTE-HANKS COMMUNICATIONS, INC., EDWARD H. HARTE, CALLER-TIMES PUBLISHING COMPANY, GREG FIEG-PIZANO, STEPHEN W. SULLIVAN, AND ROBERT E. RHODES,

Respondents.

Petition For Writ Of Certiorari To The Texas Court Of Appeals, Thirteenth District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The undersigned, counsel of record for respondents, certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that judges of this court may evaluate possible disqualification or recusal pursuant to Rule 24.1(b), *Rules of the Supreme Court of the United States*.

1. Elda Villarreal.
2. Harte-Hanks Communications, Inc.
3. Edward H. Harte.
4. Caller-Times Publishing Company.
5. Greg Fieg-Pizano.
6. Stephen W. Sullivan.
7. Robert E. Rhodes.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your respondents, Caller-Times Publishing Company and Greg Fieg-Pizano, who are the only two parties against whom petitioner sought relief in the Texas appellate courts respond as follows to the issues in Elda Villarreal's petition for writ of certiorari:

SUMMARY OF ARGUMENT

In the following paragraphs, respondents will argue:

(a) The state court judgment can stand upon an independent state ground deriving from the jury's affirmative determination that the publication was entitled to a conditional privilege under Sec. 73.002, *Tex.Civ.Prac. & Rem. Code.*

(b) In any event, Ms. Villareal's failure to secure a finding of requisite malice forecloses her libel action under *New York Times Co. v. Sullivan*, 84 S.Ct. 710, 376 U.S. 254, 280, 11 L.Ed.2d 686, 710 (1964), because she was a "public official" as a matter of law (or, there is sufficient evidence to support the jury's resolution of fact issues prerequisite to that determination), since Ms. Villareal's duties as a child protective services specialist (i) involved a matter of great public importance (investigation and correction of child abuse) and (ii) the parameters of her position, as well as her performance of her job, allowed her to take control of situations involving and make critical, lasting determinations concerning the existence of child abuse or neglect, removal of children from their home, implementation of foster care for removed children, and termination of parental rights. In sum, by virtue of her duties and authority, Ms. Villareal had or appeared to have " * * * substantial responsibility for or control over the conduct of government affairs * * * " sufficient to satisfy *Rosenblatt v. Baer*, 86 S.Ct. 669, 383 U.S. 75, 15 L.Ed.2d 597 (1966).

REASONS FOR DENYING THE WRIT

Ms. Villarreal's petition for writ of certiorari seeks relief in this libel case on the premise that she was not a "public official" as a matter of law; therefore, she hopes, she did not have to meet the malice standard of *New York Times Co. v. Sullivan*, 84 S.Ct. 710, 376 U.S. 254, 11 L.Ed.2d 686 (1964), which she failed to prove. To the contrary, Ms. Villarreal was a "public official" as a matter of law, but, in any event, the judgment stands upon independent state-based grounds:

1.

The judgments below are supported on an independent state law basis.

Respondents defended this action under a statutory conditional privilege that pertains when a newspaper or other periodical renders

> " * * * a fair, true, and impartial account of . . . a judicial proceeding, . . . an official proceeding, . . . [or] . . . reasonable and fair comment on or criticism of an official act of a public official or other matter of public concern published for general information."

§ 73.002, *Tex. Civ. Prac. & Rem. Code*. See 3 *Vernon's Civil Practice & Remedies Code Anno.* 440-441; Appendices A and B.

The jury answered "Yes" to a special question asking if

> " * * * the article entitled 'Child Welfare Has Long File On Sisters' published in the second edition of the Corpus Christi Times on February 8, 1985, was a fair, true and impartial account of

> the activities of the Texas Department of Human Resources, the Corpus Christi Police Department and the Nueces County District Attorney's Office?" (Tr. 14; Appendix B.)

The statutory privilege operates upon (i) the quality of the publication and (ii) the source of the publication. The Texas statutory privilege is broader than the First Amendment. The jury's affirmative finding of the existence of the state privilege is not challenged in the petition for writ of certiorari, and, therefore, the judgments below rest upon an independent state ground, rendering this cause uncertworthy. *Herb v. Pitcairn*, 65 S.Ct. 459, 324 U.S. 117, 89 L.Ed. 789 (1944).

2.

Elda Villarreal was a "public official" as a matter of law or, at least, the jury's determination that she was is supported by evidence.

The legal principles applicable to the issue of "public official" are quite well known to this court and not seriously in dispute between the parties, to wit:

This court underscored its firm conviction that the First Amendment freedoms protected by *New York Times Co. v. Sullivan*, 84 S.Ct. 710, 376 U.S. 254, 280, 11 L.Ed.2d 686, 710 (1964), and the rigid burden of proof relative thereto, are not to be compromised or abridged by promulgation of overly-rigid criteria circumscribing the concept of the "public official". In that case, it was said:

> " * * * (W)e have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this [New York Times] rule, or otherwise specify categories of

> persons who would or would not be included. * * * " (376 U.S. 283, 11 L.Ed.2d 708, note 23.)

The court reconfirmed this commitment to giving the First Amendment broad play *vis a vis* the defamatory utterance about a "public official" when, in *Rosenblatt v. Baer*, 86 S.Ct. 669, 383 U.S. 75, 15 L.Ed.2d 597 (1966), it held:

> " * * * No precise lines [defining 'public official'] need be drawn for the purposes of this case. The motivating force for the decision in *New York Times* was twofold. We expressed 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, *and* that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' * * * There is, first, a strong interest in the debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. * * * " (383 U.S. 85, 15 L.Ed.2d 605.)

Looking again at the parameters of the "public official" concept, this court further remarked in *Baer*:

> " * * * It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs."

* * *

> " * * * Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply." (383 U.S. 86, 15 L.Ed.2d 605-606.)

The court expanded upon the latter criteria, as follows, in footnote 13:

> " * * * The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges and controversy." (383 U.S. 86, 15 L.Ed.2d 606.)

The *Baer* criteria are more than adequately met by the record.[1] Ms. Villarreal can escape this conclusion only by

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[1] In *Baer*, supra, this court held " * * * It is for the trial judge *in the first instance* to determine whether the proofs show respondent to be a 'public official.' " (383 U.S. 88, 15 L.Ed.2d 606.) The italicized phrase has been the source of some confusion. Cfr. *Meeropol v. Nizer*, 560 F.2d 1061, 1066, n. 6 (2nd Cir. 1977), cert. den., 434 U.S. 1013 (1978); *Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir. 1981), cert. den., 454 U.S. 964 (1981); *McCusker v. Valley News*, 428 A.2d 493, 495 (N.H. Sup. 1981); *Cornett v. Prather*, 737 S.W.2d 159, 160 (Ark. Sup. 1987).

Characterizing "public official" status as one of law is appropriate when the authority and duties of the purported official are not disputed. There are rare cases, however, when there is a dispute about authority, duties, or course-and-scope; thus, that is the apparent reason some courts say the issue may

(Continued on following page)

the gambit of making it appear as if she was little more than a menial public servant who performed no function whatsoever except when explicitly directed to do so by higher authority; thus, the reason for tautologizing such statements as " * * * Her supervisor approved Mrs. Villarreal's recommendations * * * " (Petition 4), " * * * After the supervisor approved the plan * * * " (Petition 4), " * * * As instructed by her supervisor * * * " (Petition 4), etc. That is hardly the role or authority of the position of a child protective services specialist which Ms. Villarreal occupied, as the following review of the record reveals:[2]

(Continued from previous page)

be a mixed question of law and fact. Cfr. *Bufalino v. Detroit Magazine, Inc.*, 449 N.W.2d 410 (Mich. Sup. 1989); 3 *Restatement (2nd) of the Law of Torts* 316, "Privileges", § 619, Comment on Subsection (1) (1977).

That seems to have been the view of the trial court here. In overruling respondents' motion to determine Ms. Villarreal's status as a matter of law, he said: " * * * in the first instance, the Court finds it's a mixed question, under the facts. * * * " (S.F. 1232, lines 10-12.) The court then proceeded to instruct the jury on the law of "public officials", to which Ms. Villarreal did not object. (Appendix C.) In any event, at every appellate level, respondents urged that Ms. Villarreal was a "public official" as a matter of law. The judgment below, thus, can be affirmed on that theory or the theory that the jury's determination is supported by the evidence reviewed herein.

[2] "S.F. ___" references are to the official statement of facts (transcript of proceedings) filed as part of the record in the Texas appellate courts.

A.

The Public Interest in a Child Services Specialist

The Texas Department of Human Resources is very much involved in, and affects, the lives of Texas citizens through its various departments. (S.F. 1142.) Among other things, it is the agency mandated by statute to intervene on behalf of children in neglect and abuse cases. (S.F. 151.) Child abuse and neglect is a subject of tremendous public interest in Corpus Christi, throughout the state, and across the nation. (S.F. 47, 151-152, 889-890.) Child abuse and neglect has been a " * * * very controversial issue for the Department * * * " (S.F. 152), and how public agencies, like DHR, " * * * respond to and react to complaints of child abuse * * * " is a highly newsworthy item because of this public interest. (S.F. 890.) There is explicit testimony that the manner in which the department handles child abuse cases is " * * * something that is of tremendous public concern * * * ". (S.F. 152.)

B.

Public Scrutiny of a Child Service Specialist's Qualifications

That the position and qualifications of a child protective services specialist, like Elda Villarreal, " * * * invite public scrutiny * * * ", *Baer*, supra, at 383 U.S. 87, 15 L.Ed.2d 606, is obviated, we think, by the fact that the firestorm of public outrage upon which Ms. Villarreal built her case for damages (S.F. 1042-1078) erupted because of the public's perception that a child protective services specialist had performed her duties in a dilatory, substandard manner. (S.F. 104.)

Just listing the duties of a child protective services specialist reveals the abiding, perspicuous public interest in such workers' " * * * qualifications and performance * * * ", *Baer*, supra, 383 U.S. 87, 15 L.Ed.2d 606, to wit:

The Department of Human Resources receives reports of child abuse from a variety of sources within the community. (S.F. 99, 147.) Specialists, like Elda Villarreal, are assigned to investigate these reports (S.F. 173, 944-955), and, depending upon the priority category of the complaint (S.F. 944-955), this investigation may require 24 hour resolution. (S.F. 944-945.) In the investigation, the specialist becomes the person " * * * on the front line * * * " (S.F. 151) who comes in direct contact with the children, the families, other state agencies, school officials, law enforcement authorities, and the legal system. (S.F. 107, 151.)

In particular, the specialist confronts parents about child abuse or neglect in emotionally-charged situations. (S.F. 129.) Based upon his or her investigation, the specialist must make a quick but well-reasoned and informed decision about removal of the child based on information obtained in those situations. (S.F. 147-149, 810, 1143.) If a decision to effectuate a temporary removal is made, the specialist secures administrative approval (S.F. 964-966, 969), prepares court documents and secures a court order implementing the removal (S.F. 46, 147, 970, 980-984), physically removes the child from the custodian, frequently in the midst of extreme antagonism (S.F. 173, 810, 970-977), arranges emergency foster care (S.F. 36, 45), and makes the required report to law enforcement authorities. (S.F. 29, 173.)

The specialist then prepares treatment and service plans. (S.F. 147-150, 1003-1004.) A part of that process involves the weighty decision to seek termination of parental rights and place the child for adoption. (S.F. 946.) If a decision to terminate is made, the specialist assists in preparation of, or actually prepares, court documents (S.F. 147), counsels with the attorney for the State and the attorney *ad litem* for the child or children (S.F. 1009-1011, 1018-1019, 1029-1030), prepares for the hearing (S.F. 1024), and gives fact and opinion testimony at the hearing about the advisability of permanent removal and termination (S.F. 46, 147, 1143) – testimony that is doubtless given great weight by the trial judge *if* the specialist is well trained.

Matters incident to the duties just described include monitoring the child's adaption to the foster home (S.F. 1003, 1006, 1011-1018), providing for the child's medical and psychological needs (S.F. 36, 45, 997-998, 1003-1004, 1034, 1047-1048), and coordinating with the police in any criminal investigation of the circumstances that led to the complaint and removal. (S.F. 36, 46-47, 1160.) Just to give one record example of the pervasiveness of Ms. Villarreal's exercise of government authority, after her initial interview with school officials where she learned the plight of the children who became the subject of the allegedly libelous article, Ms. Villarreal pronounced:

> " * * * I will be *taking over* this investigation . . . and, *if I have to remove these children* which it appears that I will have to do * * * . I will *be in charge* from now on and will coordinate whatever I need to do with the children with you. * * * " (S.F. 960, emphasis added.)

Summed up, the role of a child protective services specialist is a very important one in the child abuse/neglect process (S.F. 173); the specialist provides critical services to the children, the family, and the community in that regard. (S.F. 151.) The specialist is very influential on the lives of the children to whom his or her services are provided. (S.F. 1143.) As a consequence, society has a considerable stake in the employment of specialists who are sufficiently qualified and trained to make enlightened decisions in situations that can forever affect the course of a child's life. (S.F. 811-812.)

Any parent scrutinized by a child protective services specialist in response to an allegation of abuse or neglect would find it impossible to believe that such official, by reason of the specialist's ability to make decisions that implement the most Draconian of judicial remedies, was not the very embodiment of governmental authority. Indeed, Elda Villarreal purposely drew her service plan in a way that would prevent the natural parents from ever regaining possession of Nancy and Rosario (S.F. 968-969, 1001-1002, 1025), and she gave court testimony that implemented that goal. (S.F. 1009-1011, 1018-1025, 1029-1033, 1166.) It would be hypocritical to tell the children's parents that, in so acting, Elda Villarreal did not have " * * * substantial responsibility for or control over the conduct of governmental affairs * * * ", *Baer*, supra, 383 U.S. 85, 15 L.Ed.2d 605, and it would be disingenuous for the court system to so hold. *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. Sup. 1978).[3]

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[3] Without belaboring the court with explicit detail, we refer to the following cases, where the "public official"

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WHEREFORE, PREMISES CONSIDERED, respondents pray that the petition for writ of certiorari be denied. They additionally pray for such other and further

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designation was bestowed upon individuals with comparable or considerably less dynamic spheres of responsibility and who had duties far less dramatic than those of our petitioner here:

(i) a high school wrestling coach, *Johnston v. Corinthian Television Corporation*, 583 P.2d 1101 (Okla. Sup. 1978),

(ii) a state automobile license tag agent, *Hodges v. Oklahoma Journal Publishing Co.*, 617 P.2d 191 (Okla. Sup. 1980),

(iii) a nursing home (housing ill, infirm, subnormal, and mentally retarded children), *Doctors Convalescent Center v. East Shore Newspapers, Inc.*, 244 N.E.2d 373 (Ill. App. 1968),

(iv) a manager of a community center, *Brown v. Kitterman*, 443 S.W.2d 146 (Missouri Sup. 1969), and

(v) a government auditor, *Vazquez Rivera v. El Dia, Inc.*, 641 F. Supp. 668 (D.C. Puerto Rico 1986).

relief to which they may justly be entitled at law or in equity.

Respectfully submitted,

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APPENDIX A

§ 73.002. Privileged Matters

(a) The publication by a newspaper or other periodical of a matter covered by this section is privileged and is not a ground for a libel action. This privilege does not extend to the republication of a matter if it is proved that the matter was republished with actual malice after it had ceased to be of public concern.

(b) This section applies to:

(1) a fair, true, and impartial account of:

(A) a judicial proceeding, unless the court has prohibited publication of a matter because in its judgment the interests of justice demand that the matter not be published;

(B) an official proceeding, other than a judicial proceeding, to administer the law;

(C) an executive or legislative proceeding (including a proceeding of a legislative committee), a proceeding in or before a managing board of an educational or eleemosynary institution supported from the public revenue, of the governing body of a city or town, of a county commissioners court, and of a public school board or a report of or debate and statements made in any of those proceedings; or

(D) the proceedings of a public meeting dealing with a public purpose, including statements and discussion at the meeting or other matters of public concern occurring at the meeting; and

(2) reasonable and fair comment on or criticism of an official act of a public official or other

matter of public concern published for general information.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

APPENDIX B

QUESTION NO. 8

Do you find from a preponderance of the evidence that the article entitled "Child Welfare Has Long File On Sisters" published in the second edition of the Corpus Christi Times on February 8, 1985 was a fair, true and impartial account of the activities of the Texas Department of Human Resources, the Corpus Christi Police Department and the Nueces County District Attorney's Office?

Answer "Yes or No"

Answer: Yes

> In connection with this question, you are instructed that in order for an account to be true, it need not be literally or absolutely true, but only substantially true. The truth or falsity of the account is judged in its ordinary meaning to the average reader of the publication.

APPENDIX C

QUESTION NO. 7

Do you find, from a preponderance of the evidence, that on or, before February 8, 1985, ELDA VILLARREAL was a "Public Official"?

Answer "Yes or No"

Answer: Yes

You are instructed in connection with this question that a "Public Official" may be an elected Official, a full-time public employee or temporary public employee whose position possesses such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees. Such importance can be shown by the amount of public interest in the activity, the amount of authority exercised on behalf of the governmental agency, the amount of discretion that the job requires, whether the person supervises other employees of the governing agency, and whether the person acts as a representative of the governmental agency.

The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.